UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DAN PATTERSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 01-78-P-H***
	)	
OFFICER DOLAN, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM DECISION ON DEFENDANTS' MOTION TO STRIKE

The defendants, Joel Dolan and James Millett, both police officers in the city of Portland, Maine, move for summary judgment in this action alleging violation of the plaintiff's federal constitutional rights and assault under state law.[1] I deny the motion to strike in part and grant it in part and recommend that the court grant the motion for summary judgment in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a

[1] Counts included in the complaint naming Michael Chitwood, chief of the Portland Police Department, and the city of Portland, as well as a count alleging that Dolan and Millett engaged in malicious prosecution of the plaintiff, have been dismissed by stipulation. Docket No. 22.

reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr*., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Motion to Strike

The defendants have moved to strike the affidavit submitted by the plaintiff as the sole support for the statement of material facts that he filed in opposition to the motion for summary judgment. Motion to Strike Plaintiff's Affidavit in Support of His Objection to Defendants' Motion for Summary Judgment ("Motion to Strike") (Docket No. 25). While the motion purports to seek the striking of the entire affidavit, the defendants present argument in support of striking only the following paragraphs: 4, 7, 11, 13, 16-18, 23, 24 and 29. *Id*. at 1-3. Accordingly, the court will not in any event strike the paragraphs for which the defendants provide no reason why the court should do so.

The defendants attack three paragraphs of the plaintiff's affidavit as presenting inadmissible hearsay: 23, 24 and 29. *Id*. at 1. The plaintiff agrees that paragraphs 24 and 29 contain hearsay.

Memorandum in Opposition to Defendants' Motion to Strike Plaintiff's Affidavit ("Plaintiff's Strike Opposition") (Docket No. 26) at 2. They will accordingly be stricken. Paragraph 23 provides:

> At the time of the incident, I was recovering well. I was off my crutches, I had great flexibility. The doctor said I was doing fine and to go and ride the bike at the gym a couple times, but I didn't need any physical therapy or anything like that.

Affidavit of Plaintiff Dan Patterson ("Plaintiff's Aff.") (Docket No. 21) ¶ 23. The plaintiff agrees that the third sentence of this paragraph constitutes hearsay, but contends that the first two sentences do not. Plaintiff's Strike Opposition at 2. I agree. The third sentence is therefore stricken.

The defendants' remaining challenges to paragraphs of the plaintiff's affidavit are based on asserted differences between that document and the plaintiff's deposition testimony.

In paragraph 4, the plaintiff states: "During the entire 20 minutes, my car was turned off and in first gear." *Id*. ¶ 4. In his deposition, after the plaintiff testified about what happened "after [he] was pulled out" of his truck, he was asked, "And the keys were in your truck, I take it?" and "Was it still running," and he responded in the affirmative. Deposition of Daniel A. Patterson ("Plaintiff's Dep.") at 30. Statements in an affidavit submitted by an interested witness in connection with a motion for summary judgment cannot create a disputed material fact by contradicting deposition testimony in the absence of a satisfactory explanation of the reason for the change in testimony. *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994). Such a contradiction is presented by paragraph 4 of the plaintiff's affidavit and it accordingly will be stricken.

The defendants take exception to the use of the work "disgusted" in paragraph 7 of the plaintiff's affidavit, pointing out that he testified at his deposition that he was "concerned" about the people in the street being beaten. Motion to Strike at 2. The paragraph from the affidavit states as follows: "Watching this scene unfold, I became disgusted and said to 3 or 4 officers 'this is pathetic.'" Plaintiff's Aff. ¶ 7. At his deposition, the plaintiff said: "I was concerned about the people in the

street getting beat with batons. . . . For three or four officers lugging people by my truck, I said, three words, 'this is pathetic.'" Plaintiff's Dep. at 25. The two cited excerpts do not necessarily present a contradiction. Because there is no apparent contradiction, *Colantuoni* does not apply. The paragraph will not be stricken.

The same is true of paragraph 11 of the plaintiff's affidavit. He characterizes the facts differently from the characterization used in his deposition, but there is no contradiction in those differences.

With respect to paragraphs 13, 16 and 17, the defendants contend that "this information not present in Patterson deposition." Motion to Strike at 2. The fact that the plaintiff seeks to augment his deposition testimony by adding more facts for consideration at summary judgment through an affidavit is not objectionable under *Colantuoni*, the only authority cited by the defendants, or indeed for any other reason readily apparent to the court.

The defendants' motion includes a similar reference to the following paraphrase of a sentence contained in paragraph 18 of the plaintiff's affidavit: "Officer shoved Mr. Patterson and he fell to the ground behind the police van." *Id.* For the same reason, this sentence will not be stricken. The defendants also contend that the first sentence in paragraph 18 of the plaintiff's affidavit — "I was not given any help to me [sic] feet" — contradicts his deposition testimony. *Id*. The plaintiff agrees that this sentence should be stricken. Plaintiff's Strike Opposition at 3-4.

In sum, the motion to strike is granted as to paragraphs 4, 24 and 29 of the plaintiff's affidavit and as to the first sentence of paragraph 18 and the third sentence of paragraph 23 of that affidavit and otherwise denied.

III. Factual Background

The following material facts are appropriately supported in the parties' respective statements of material facts.

The events giving rise to this action took place on December 31, 2000. Statement of Material Facts ("Defendants' SMF") (Docket No. 11) ¶ 1; Plaintiff's Responsive Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 19) ¶ 1. The plaintiff arrived in his pick-up truck at the intersection of Fore and Union Streets in Portland at approximately 1:00 a.m. when the bars were closing and people were streaming out into the streets. Plaintiff's Statement of Disputed Material Facts ("Plaintiff's SMF") (Docket No. 20) ¶ 2; Defendants' Reply to Plaintiff's Statement of Disputed Material Facts ("Defendants' Responsive SMF") (Docket No. 24) ¶ 2. At some time shortly after 1:00 a.m. Millett came upon a disturbance at this location. Defendants' SMF ¶ 3; Plaintiff's Responsive SMF ¶ 3. Four males were standing outside a pickup truck and appeared to be about to start fighting. *Id*. ¶ 4. Millett spoke to the men, diffused the situation and sent the people on their way. *Id*. ¶ 6. By that time, three other police officers had arrived as backup. *Id*. ¶ 7. Millett saw two of those officers in front of the Better End dealing with a black male. *Id*. ¶ 9. Those officers began to place the black male under arrest. *Id*. ¶ 10.

A fourth officer assisted in getting a second black male away from the arresting officers. *Id.* ¶ 12. Millett assisted in arresting this individual. *Id*. ¶ 13. At this time, a crowd of 80-100 people had gathered. *Id*. ¶ 16. Millett asked the crowd to calm down, telling them to leave the area or they would subject themselves to arrest for disorderly conduct. *Id*. ¶ 17;[2] Deposition of Anthony D. Millett at 15. The warning had no effect on the crowd, and a police sergeant who was present requested that all

[2] The plaintiff's response to this and nine other paragraphs of the defendants' statement of material facts is the following: "Plaintiff has no evidence upon which to contradict this statement at this time; nonetheless, Plaintiff reserves the right to call witnesses at trial to rebut this statement." Plaintiff's Responsive SMF ¶ 17. This is not an appropriate response under this court's Local Rule 56(c) and will be (*continued on next page*)

available units respond to the scene. *Id*. ¶¶ 18-19. Dolan responded to this request at approximately 1:10 a.m. in his cruiser. *Id*. ¶ 20. There were approximately 10 officers at the scene when Dolan arrived. *Id*. ¶ 23. Millett had arrested a man who had refused to leave the area and who was inciting the crowd as one of the loudest and more vocal of the people in the crowd. *Id*. ¶ 24. Dolan tried to physically push the crowd along because they were not listening to his orders to disperse. *Id*. ¶¶ 26-27, 29. Someone grabbed Dolan's nightstick; after a struggle, he regained possession and arrested the individual with the assistance of other officers. *Id*. ¶ 30.

There were ten to fifteen officers at the scene; the crowd remained unruly, throwing snowballs and hurling vulgarities. *Id*. ¶ 32. Millett assisted several officers in making arrests. *Id*. ¶ 33. As Dolan was walking a person he arrested to the arrest van, he passed the plaintiff's truck and the plaintiff said, "This is pathetic." *Id*. ¶ 35. The plaintiff said the same thing to three or four officers who were engaged in similar activity. *Id*. ¶ 42. Dolan and the plaintiff engaged in contentious conversation. *Id*. ¶¶ 44-47. Dolan asked the plaintiff for his license. *Id*. ¶ 48. The plaintiff refused to produce his license to Dolan. *Id*. ¶ 50. He asked Dolan for his name and badge number. *Id*. ¶ 51. Dolan then made the decision to arrest the plaintiff for obstructing government administration. *Id*. ¶ 54. Dolan opened the door to the truck. *Id*. ¶ 55.

Millett then came on the scene and saw what appeared to be a verbal confrontation between Dolan and the plaintiff. *Id*. ¶ 56. He observed the plaintiff leaning over toward the center console of his vehicle and arguing with Dolan. *Id*. ¶ 57. He then assisted Dolan in removing the plaintiff from his truck. *Id*. ¶ 58. The plaintiff told the officers that he had just had surgery or had a knee problem. *Id*. ¶ 60. On December 21, 2000 the plaintiff had undergone arthroscopic surgery on the meniscus of his left knee. Plaintiff's SMF ¶ 21; Defendants' Responsive SMF ¶ 21. After being handcuffed, the

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deemed an admission in each instance.

plaintiff was taken to the arrest wagon. Defendants' SMF ¶¶ 64, 69; Plaintiff's Responsive SMF ¶¶ 64, 69. The plaintiff was the last person put in the van and was shoved in, coming to rest with his head underneath a bench and his feet up around the shoulders of the person sitting across from him. *Id.* ¶ 72.

IV. Discussion

The defendants contend that they violated none of the plaintiff's constitutional rights and that they are entitled to qualified immunity from the federal claim set forth in Count I of the amended complaint. Defendants' Motion for Summary Judgment ("Motion") (Docket No. 10) at 3-5. They argue that they are entitled to discretionary act immunity from the state-law assault claim. *Id.* at 12-14.

A. The Federal Claim

Count I of the amended complaint alleges, pursuant to 42 U.S.C. § 1983, that the defendants deprived the plaintiff of his constitutional rights to bodily integrity and due process of law and to be free of the use of unreasonable force. First Amended Complaint, etc. ("Amended Complaint") (Docket No. 6) ¶¶ 47-49. The plaintiff's memorandum of law refines the claim, stating that "[t]his is an excessive force claim." Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 18) at 2. The defendants assert a defense of qualified immunity. Motion at 3-5.

In such cases,

> the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.

Saucier v. Katz, 121 S.Ct. 2151, 2155-56 (2001). The first question to be addressed by the court is the following: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id*. at 2156.

> [I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition.

Id. "*Graham v. Connor*, [490 U.S. 386 (1989),] clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Id*. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*.

The reasonableness of the officer's belief is to be judged from the on-scene perspective because "police officers are often forces to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. The relevant factors include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396. Officers are entitled to immunity for reasonable mistakes. *Saucier*, 121 S.Ct. at 2159.

Here, the defendants argue that "[t]here is no evidence linking any violence to Millett," and accordingly no evidence that he violated any of the plaintiff's constitutional rights. Motion at 4. With respect to Dolan, they contend that the "volatile situation" in which the plaintiff exhibited "inexplicable and unexpected belligerence" led to a "split second decision" to arrest the plaintiff, after which it was necessary to handcuff him and get him into the arrest wagon quickly. *Id*. at 5. Under these circumstances, they assert, "it would not be clear to a reasonable officer that the use of force would violate Plaintiff's constitutional rights." *Id*.

The defendants' assertion concerning Millett is incorrect. The plaintiff has provided his testimony, albeit disputed by the defendants, that he was beaten by Millett after he was on the ground

and handcuffed and that an officer other than Dolan then sprayed him in the face with pepper spray or mace and that at no time did he offer any physical resistance. Plaintiff's SMF ¶¶ 16, 17, 19; Plaintiff's Aff. ¶¶ 16, 17, 19. The defendants' statement of material facts does not suggest than any officer other than Dolan and Millett was involved in any way in the plaintiff's arrest. Defendants' SMF ¶¶ 58-69. At the summary judgment stage, the plaintiff is entitled to an inference that Millett was the other officer to which his testimony refers; such an inference is reasonable under the circumstances. The plaintiff's testimony alleges the use of force by Millett that was excessive under objective standards of reasonableness. Millett is not entitled to summary judgment because he has not shown that he may invoke qualified immunity on the basis of the sole argument he makes.

The outcome might be different with respect to Dolan were the evidence upon which he relies undisputed, but it is not. While Dolan interpreted the plaintiff's words and manner on the night in question as "angry" and "agitated," Defendants' SMF ¶ 45 & Deposition of Joel P. Dolan at 17-18, 26, the plaintiff denies that he used profanity, Plaintiff's Responsive SMF ¶¶ 35, 45; that he could have driven away from the scene, *id*. 38-41; that he refused Dolan's request that he get out of his truck, *id*. ¶¶ 53-55; or that he was "not compliant" during the arrest, *id*. ¶ 62. He also offers his own testimony that the individuals in the crowd "were not threatening the officers," and that the officers were "grabbing citizens off the sidewalk, dragging them into the street and administering beatings to them," Plaintiff's SMF ¶¶ 5-6, Plaintiffs' Aff. ¶¶ 5-6, certainly a very different scenario from that described in the defendants' statement of material facts.

In addition, the defendants misstate the applicable legal test. The question is not whether "it would not be clear to a reasonable officer that the use of force would violate Plaintiff's constitutional rights" under the circumstances present at the relevant time, but whether it would not be clear to a reasonable officer that the specific use of force alleged would violate the plaintiff's constitutional

rights. Here, the plaintiff alleges that Dolan "ripped the door of the truck open and yanked him onto the pavement;" stepped on the back of the plaintiff's left knee knowing that the plaintiff had just had surgery on that knee; struck the plaintiff's back, left and right knees, and left ankle with his nightstick; and knelt on his back, all while the plaintiff offered no resistance. Plaintiff's SMF ¶¶ 11-13, 15-17, 19; Plaintiff's Aff. ¶¶ 11-13, 15-17, 19. Even if the plaintiff's conduct was exactly as described in the defendants' statement of material facts, a conclusion that the force described by the plaintiff was reasonable under the circumstances is not the only possible one. *See, e.g., Sweatt v. Bailey*, 876 F. Supp. 1571, 1577 (M.D. Ala. 1995) (denying qualified immunity on summary judgment to officer who, according to plaintiff, beat him after he referred to officer as an "ass"). The crime for which the plaintiff was arrested, obstructing government administration, is not a severe one. 17-A M.R.S. A. § 751 (Class D crime). The evidence submitted by the defendants that might allow an inference to be drawn to the effect that the plaintiff posed an immediate threat to the safety of the officers or others is that Dolan "did not feel safe walking either in front of [the plaintiff's] truck or behind his truck" due to the plaintiff's anger, Defendants' SMF ¶ 48, and that the plaintiff's demeanor "made Dolan feel unsafe to go anywhere to help his colleagues trying to clear the crowd," *id*. ¶ 52. The justification for these subjective assertions is sufficiently challenged by the plaintiff's testimony to make it impossible to conclude as a matter of law that an immediate threat to the safety of Dolan or others existed.[3] Finally, even the defendants merely contend that the plaintiff "was not compliant but did not resist a great amount" during the arrest. Defendants' SMF ¶ 62. Application of the *Graham* factors thus does not support the defendants' position.

Dolan is not entitled to summary judgment on Count I on the basis of qualified immunity.

B. State-Law Claim

[3] The defendants characterize the plaintiff's statements as "inciting remarks," Defendants' SMF ¶ 81, but they offer no evidence that (*continued on next page*)

Count IV of the amended complaint alleges that the defendants assaulted the plaintiff. Amended Complaint ¶¶ 64-67. The defendants contend that they are entitled to discretionary function immunity pursuant to 14 M.R.S.A. § 8111(1)(E). Motion at 12-14. That statute provides, in relevant part:

> Notwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for the following:
>
> * * *
>
> **C.** Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charger, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid; [or]
>
> *** * ***
>
> **E.** Any intentional act or omission within the course and scope of employment, provided that such immunity shall not exist in any case in which an employee's acts are found to have been in bad faith.

14 M.R.S.A. § 8111(1)(C) & (E).

The effectuation of an arrest qualifies as a "discretionary function" for purposes of the statute. *Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991). The Maine Law Court nonetheless has assumed (without deciding) that the execution of such an arrest in a wanton or oppressive manner would vitiate the protections of section 8111(1). *Id*. This court accordingly has declined, in a summary

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those remarks were directed toward, or heard by, anyone other than the officers at the scene.

judgment context, to grant absolute immunity as to state-law causes of action related to a plaintiff's triable claim of arrest with excessive force. *McLain v. Milligan*, 847 F. Supp. 970, 977-78 (D Me. 1994). Inasmuch as there are genuine issues of material fact regarding whether the defendants used excessive force against the plaintiff, summary judgment on the ground of discretionary function immunity is not appropriate on Count IV.

C. Punitive Damages

The defendants also seek summary judgment on the plaintiff's claim for punitive damages on each remaining count. Motion at 6-7, 14-15. With respect to Count I,

> a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

Smith v. Wade, 461 U.S. 30, 56 (1983). Punitive damages are reserved for "instances where the defendant's conduct is of the sort that calls for deterrence and punishment over and above that provided by compensatory damages." *Davet v. Maccarone*, 973 F.2d 22, 27 (1st Cir. 1992) (internal punctuation and citation omitted). Here, the plaintiff has submitted no evidence that would support a reasonable inference of evil motive or intent on the part of the defendants. However, the evidence in the summary judgment record would allow a jury reasonably to conclude that either or both of the defendants exhibited reckless or callous indifference to the plaintiff's Fourth Amendment rights, particularly given the evidence submitted by the defendants that they receive training "on at least an annual basis in the application of the use of force." Defendants' SMF ¶ 74; Plaintiff's Responsive SMF ¶ 74. Accordingly, the defendants are not entitled to summary judgment on the demand for punitive damages in connection with the federal claim.

The state-law claim is a different matter.[4] Under Maine law

> [a]n award of punitive damages is justified where the plaintiff proves by clear and convincing evidence that the defendant acted with malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985). Express or actual malice exists when the tortuous conduct is motivated by ill will toward the plaintiff, but punitive damages are also available "where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied." *Id*. at 1361.

Boivin v. Jones & Vining, Inc., 578 A.2d 187, 189 (Me. 1990). Malice may not be established by reckless indifference to the rights of others. *DiPietro v. Boynton*, 628 A.2d 1019, 1024 (Me. 1993). Here, the plaintiff has offered no evidence of actual ill will toward him on the part of either defendant. The Maine Law Court has applied the alternate standard of proof — conduct so outrageous that malice may be implied — in a very restricted manner. For example, in *Gayer v. Bath Iron Works Corp.*, 687 A.2d 617 (Me. 1996), the defendant had offered positions on October 20 and 21 to twenty-six individuals in an apprenticeship program beginning on November 7 only to advise the apprentices on November 3 or 4 that the program had been terminated; the Law Court found "nothing in the record" to support a claim for punitive damages. *Id*. at 619-20, 622. In *DiPietro*, the Law Court overturned an award of punitive damages based on the defendant's sale of the plaintiffs' property without notice to them. 628 A.2d at 1024. In *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985), the Law Court vacated an award of punitive damages where the defendant seriously injured the plaintiff when he drove through a red light at high speed and struck the plaintiff's vehicle with sufficient force to shear her car in half. *Id*. at 1354, 1362.

In the instant case, the defendants' alleged conduct — repeatedly striking the plaintiff's back, knees and ankles and spraying his face with pepper spray or mace, all after he was handcuffed and

[4] The plaintiff fails to respond to the defendants' motion on this claim and thus is deemed to have waived opposition. Because this is a motion for summary judgment, the court must nonetheless consider the issue on its merits. *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, (*continued on next page*)

prone — is not to be condoned and may well be considered to have been undertaken with reckless indifference to the plaintiff's constitutional rights. However, it cannot meet the standard under Maine law to allow a finding of implied malice. Accordingly, the defendants are entitled to summary judgment on the plaintiff's demand for punitive damages on his state-law claim.

V. Conclusion

For the foregoing reasons, the defendants' motion to strike is **GRANTED** as to paragraphs to paragraphs 4, 24 and 29 of the plaintiff's affidavit and as to the first sentence of paragraph 18 and the third sentence of paragraph 23 of that affidavit and otherwise **DENIED**. I recommend that the defendants' motion for summary judgment be **GRANTED** as to the demand for punitive damages in Count IV of the amended complaint and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 1st day of October, 2001.

David M. Cohen
United States Magistrate Judge

DAN PATTERSON MICHAEL J. WAXMAN, ESQ.

62 (D. Me. 1991).

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